No. 92-1520

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

DENNIS RICHARD BROSS
THEODORE MARSH
STEVEN SCHMIDT

Petitioners,

vs.

EARL SMITH
DONALD WELLS
CITY OF MIDDLETOWN, OHIO

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF OF THE RESPONDENTS EARL SMITH AND DONALD WELLS IN OPPOSITION

ROBERT J. GEHRING
Counsel of Record
ROBERT J. GEHRING CO., L.P.A.
105 E. 4th Street, Suite 900
Cincinnati, Ohio 45202
Telephone (513) 721-2758

Attorney for Respondents
Earl Smith and Donald Wells

COURT INDEX PRESS, INC. 215 E. Ninth Street, Cincinnati, Ohio 45202 (513) 241-1450

BEST AVAILABLE COPY

QUESTIONS PRESENTED

The Petitioners, all public officials, claimed defamation and intentional infliction of emotional distress based upon documents which did not contain false statements of fact made with actual malice. The questions presented are:

1. Whether the Petitioners can recover for the intentional infliction of emotional distress based upon the publication of those documents without showing that the documents contained false statements of fact made with actual malice.

2. Whether the evidence was constitutionally sufficient to support a judgment against the Respondent Wells where there was no evidence to support a finding that the documents upon which a judgment was based were authored by the Respondent Wells, that they were written with actual malice or that they related to Petitioners.

TABLE OF CONTENTS

	Page
Questions Presented	1
Table of Authorities	IV
Procedureal Statement Of The Case Of The Respondents Smith And Wells	1
Factual Statement Of The Case Of Respondents Smith and Wells	4
Reasons Why The Petition Should Be Denied	5
1. No reasons exist for the grant of certiorari as the trial court and the court of appeals applied well settled principles of law in finding that there was no defamation and consequently no claim for the intentional infliction of emotional distress.	5
2. This case does not present issues that warrant review by the Supreme Court	8
Conclusion	9

TABLE OF AUTHORITIES

CASES	Page
Bose Corporation v. *Consumers Union*, 466 U.S. 485 (1984)	7
Bross v. *Smith*, 80 Ohio App. 3d 246 (1992)	2
Bross v. *Smith*, 65 Ohio St. 3d 1431 (1992)	3
Greenbelt Cooperative Publishing Assn. v. *Bresler*, 398 U.S. 6 (1970)	6
Graver Tank & Mfg. Co. v. *Linde Co.*, 336 U.S. 271 (1949)	6
Hustler Magazine v. *Falwell*, 485 U.S. 46 (1988)	3, 5, 6, 8
Milkovich v. *Lorain Journal Co.*, 497 U.S. 1 (1990)	7
Mueller v. *Stover Communications, Inc.*, 46 Ohio App. 3d 57, 545 N.E.2d 1317 (1988)	6
New York Times v. *Sullivan*, 376 U.S. 254 (1964)	6, 7
Rodgers v. *Lodge*, 458 U.S. 613 (1982)	6
Rosenblatt v. *Baer*, 383 U.S. 75 (1966)	7
UNITED STATES CONSTITUTION:	
Amendment I	6, 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

No. 92-1520

DENNIS RICHARD BROSS
THEODORE MARSH
STEVEN SCHMIDT

Petitioners,

vs.

EARL SMITH
DONALD WELLS
CITY OF MIDDLETOWN, OHIO

Respondents.

BRIEF OF THE RESPONDENTS EARL SMITH AND DONALD WELLS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

The Respondents Earl Smith and Donald Wells request that this Court deny the Petition for Writ of Certiorari.

PROCEDURAL STATEMENT OF THE CASE OF THE RESPONDENTS SMITH AND WELLS

The Petitioners, three police officers of the Middletown, Ohio Police Department, initiated this action in the Butler County, Ohio Common Pleas Court in 1989. All Petitioners

claimed defamation and intentional infliction of emotional distress. The defamation claims were based upon nine documents which the Petitioners claimed were authored by the Respondent Wells, an assistant chief in the police department. The Petitioners claimed that the Respondents Smith (the Middletown chief of police) and the City of Middletown were liable respectively as the supervisor and employer of Wells.

The action was tried to a jury in July of 1990. At the close of the Petitioners' case the court directed a verdict dismissing all defamation claims of all of the Petitioners and the intentional infliction of emotional distress claims of Petitioners Bross and Schmidt. The court also directed a verdict as to Petitioner Marsh's intentional infliction of emotional distress claim against the Respondents Smith and the City of Middletown.

The only issue submitted to the jury was Petitioner Marsh's intentional infliction of emotional distress claim against the Respondent Wells, even though the court had previously ruled that the documents which formed the basis of Petitioners' claims were not defamatory. The jury returned a verdict in favor of Marsh against Wells in the amount of $100,000.00 compensatory damages and $500,000.00 punitive damages.

Post-trial motions were filed by the Petitioners and the Respondent Wells. Wells in his post trial motions moved for a judgment notwithstanding the verdict as well as for a new trial. The trial court granted Wells' motion for a new trial finding that the verdict was the result of passion or prejudice and granted a remittitur. Thereafter, the trial court modified its post trial judgment, still finding that the verdict was the result of passion or prejudice, and granted a new trial only as to damage issues.

The Petitioners and the Respondent Wells filed appeals in Ohio's Twelfth District Court of Appeals. That opinion is found at 80 Ohio App. 3d 246 (1992). Wells presented seven

assignments of error. The court of appeals only ruled on two of the assignments of error.

On an assignment of error regarding the admissability of the allegedly defamatory documents as evidence, the court of appeals ruled that the documents were properly authenticated and admitted into evidence. On another assignment of error presented by Wells, the court of appeals found that the documents were *not* defamatory and for that reason, under the holding of *Hustler Magazine* v. *Falwell*, 485 U.S. 46 (1988), no claim for intentional infliction of emotional distress was stated. The court of appeals thus affirmed the trial court's dismissal of all defamation claims, affirmed the directed verdict granted by the trial court on Bross' and Schmidt's intentional infliction of emotional distress claims, and reversed the trial court's judgment on the intentional infliction of emotional distress claim of Marsh against Wells.

Since the court of appeals found its decision on the constitutional issue to be dispositive of the entire case, it summarily overruled all other assignments of error including Wells' assignments of error relating to weight of the evidence, damages, the standard for proof in a claim of intentional infliction of emotional distress, and his motion for a new trial.

The Petitioners filed a notice of appeal to the Ohio Supreme Court arguing that the Ohio Court of Appeals erroneously decided the case. Wells filed a notice of appeal to the Ohio Supreme Court in order to preserve his right to argue error on the part of the court of appeals.

The Ohio Supreme Court refused to entertain jurisdiction of the case and dismissed the appeal finding that no substantial constitutional question existed. 65 Ohio St. 3d 1431 (1992).

FACTUAL STATEMENT OF THE CASE OF RESPONDENTS SMITH AND WELLS

Subject to the following corrections and additions, Respondents Smith and Wells adopt the factual statement of the case as set forth by the Butler County, Ohio Court of Appeals found in the appendix to the Petition for Writ of Certiorari.

The following corrections and additions should be noted. No witness testified that the Respondent Wells actually authored or published any of the documents which were the basis of Petitioners' claims. There was a complete lack of evidence showing that the Respondent Wells played any part in publishing any of the letters that were submitted into the evidence. Two of the letters were handwritten and there was no testimony identifying the Respondent Wells as the author of those letters.

Despite Petitioners' contentions, there was no finding that the documents contained any threats against the Petitioners. Indeed, the evidence at trial and as found by the court of appeals was that the documents could not be found to contain statements of fact or threats to the Petitioners.

REASONS WHY THE PETITION SHOULD BE DENIED

1. No reasons exist for the grant of certiorari as the trial court and the court of appeals applied well settled principles of law in finding that there was no defamation and consequently no claim for the intentional infliction of emotional distress.

In *Hustler Magazine* v. *Falwell*, *supra*, the Court held that no cause of action exists for comments relating to public officials where there is no reasonable basis to believe that the statements were false. The Court specifically stated:

> . . . [P]ublic figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contained a false statement of fact which was made with "actual malice", i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true. 485 U.S. at 56.

The Petitioners claim that the outrageous nature of the letters provides them with a cause of action. However, the court in *Hustler* rejected such an argument:

> "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse impact on the audience. 485 U.S. at 55.

In *Hustler*, a nationally known minister and commentator on politics and public affairs filed suit against *Hustler* magazine claiming emotional distress arising from a "parody"

which among other things portrayed him as having engaged in a drunken, sexual rendezvous with his mother in an outhouse.

The *Hustler* Court held that a state's interest in protecting public figures from emotional distress is not sufficient to deny First Amendment protection to speech even though it is patently offensive and intended to inflict emotional injury, when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved. 485 U.S. at 50.

The court of appeals correctly determined that the Petitioners were public officials. *Mueller* v. *Stover Communications Inc.*, 46 Ohio App. 3d 57, 545 N.E.2d 1317 (1988). It appropriately applied the standards for defamation cases set forth in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964). Applying *Hustler* and *New York Times*, the appellate court correctly found that there was no defamation and thus no claim for the intentional infliction of emotional distress based upon the publication of the documents at issue here.

Here, there was no evidence that anyone viewed the letters as being defamatory. No witnesses testified that they thought the Petitioners' reputations were affected. Similarly, there was a lack of evidence to support the Petitioners' claims that the letters contained actual threats. *See Greenbelt Cooperative Publishing Assn.* v. *Bresler*, 398 U.S. 6, (1970) ("[E]ven the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet . . ." *Id.* at 14).

Certiorari should not be granted in this case as the Petitioners are essentially asking this Court to review evidence and facts presented to the trial court and the court of appeals. This Court has consistently held that it will not undertake to review findings of fact by two courts below in the absence of a very obvious and exceptional show of error. *Graver Tank & Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949) and cases cited; *See also Rodgers* v. *Lodge*, 458 U.S. 613, 623 (1982).

There is no constitutional imperative for this Court to review this case. The standards put forth by this Court in public official defamation cases from *New York Times* to *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1 (1990) were followed by the court of appeals. The appellate court conducted an extensive and independent review as required by *Bose Corporation* v. *Consumers Union*, 466 U.S. 485 (1984). Under the *New York Times* v. *Sullivan* standard, the Petitioners had the burden of showing by clear and convincing evidence that these documents were defamatory. The trial judge found that the documents were not defamatory as did the court of appeals. Deference should be granted to those two identical findings of fact.

Because the court of appeals found that the documents were not defamatory and thus could not support a jury finding of intentional infliction of emotional distress, it summarily overruled all other contentions made by the Respondent Wells as to whether or not the evidence was sufficient to support a finding that he did indeed author and publish the documents in question. However, it never directly addressed the issue of whether sufficient evidence was presented for a jury to conclude that Wells wrote the letters. Should this Court grant certiorari, the Respondent Wells will argue that the evidence was constitutionally insufficient to support a finding that Wells authored and published the documents. The evidence at trial was also insufficient to support a finding that the documents were written with malice or that they even referred to the Petitioners. At best, the documents were no more than severe and crude criticisms of government made by an anonymous author. The First Amendment prohibits the imposition of liability on such a basis. *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966).

2. This case does not present issues that warrant review by the Supreme Court.

This case does not present an opportunity for the Court to further review its prior decisions in the area of defamation and intentional infliction of emotional distress. Those issues have been recently visited and decided by this Court in *Hustler* v. *Falwell*, *supra*.

This case does not involve an issue of great public importance. This case was an internal squabble among personalities within the Middletown, Ohio Police Department. This is not a case that presents an issue of defamation in the context of the mass media. There is no conflict with other decisions. This case contains unique facts that are not likely to be encountered by other litigants and thus will not have a great impact on other cases.

CONCLUSION

For the reasons set forth herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT J. GEHRING
Counsel of Record

ROBERT J. GEHRING CO., L.P.A.
105 E. 4th Street, Suite 900
Cincinnati, Ohio 45202
Telephone (513) 721-2758

Attorney for Respondents
Earl Smith and Donald Wells